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State v. Smith Appellant's Reply Brief Dckt. 44499

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	NO. 44499
)	
Plaintiff-Respondent,)	
)	BANNOCK COUNTY
v.)	NO. CR 2014-2969
)	
KASEY A. SMITH,)	
)	
Defendant-Appellant.)	
)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK**

**HONORABLE DAVID C. NYE
District Judge**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of Facts and Course of Proceedings	1
ISSUES PRESENTED ON APPEAL	3
ARGUMENT	4
I. The District Court Erred In Denying Mr. Smith’s Motion To Suppress	4
II. The District Court Erred In Concluding Mr. Smith Breached The Plea Agreement, Thereby Relieving The State Of Its Obligation To Recommend A Unified Sentence Of Ten Years, With Three Years Fixed	6
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Federal Cases

<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	5
--	---

State Cases

<i>State v. Brown</i> , 160 Idaho 635 (Ct. App. 2016)	5
<i>State v. Jafek</i> , 141 Idaho 71 (2005).....	6
<i>State v. Purdum</i> , 147 Idaho 206 (2009)	4
<i>State v. Valero</i> , 153 Idaho 910 (Ct. App. 2012)	4, 5

STATEMENT OF THE CASE

Nature of the Case

Mr. Smith appeals from his conviction for felony injury to a child, challenging the district court's denial of his motion to suppress and the district court's order concluding he breached his plea agreement with the State. Mr. Smith submits this Reply Brief to clarify what happened during the polygraph examination and to address the State's legal arguments.

Statement of Facts and Course of Proceedings

Mr. Smith included a statement of facts and course of proceedings in his Appellant's Brief. (Appellant's Br., pp.1-4.) He includes this statement here only to clarify what happened during the polygraph examination, which is critical to the second issue he raises on appeal. In its Respondent's Brief, the State asserts, "Smith later participated in a psychosexual evaluation and polygraph, but when the polygraph indicated deception regarding past sexual contact with children, Smith 'terminated the process.'" (Respondent's Br., p.3 (citing R., p.387; Conf. Exs., pp.71-72).) This is not accurate. It is clear from the record that Mr. Smith *completed* the polygraph examination, but refused to answer the examiner's post-test questions regarding his supposed deception.

In his report, the polygraph examiner stated that "[a] test was administered using a fully computerized polygraph instrument" (Conf. Exs., p.72.) The examiner further stated that during the post-test interview, he confronted Mr. Smith about his deceptive responses, and Mr. Smith said he was no longer going to speak with him. (Conf. Exs., pp.71-72.) This is consistent with what Dr. Lisota described—that Mr. Smith completed the polygraph examination, but "did not pass." (Conf. Exs., p.74.) This is significant because the plea agreement obligated Mr. Smith to "complete a Psycho-sexual evaluation with a full disclosure

polygraph (PSE).” (R., p.373.) As Mr. Smith argues below, he fulfilled his obligation under the plea agreement when he completed a psychosexual evaluation with a full disclosure polygraph, and did not breach his obligation when he refused to answer the polygraph examiner’s questions regarding his supposed deception.

ISSUES

- I. Did the district court err in denying Mr. Smith's motion to suppress?
- II. Did the district court err in concluding Mr. Smith breached the plea agreement, thereby relieving the State of its obligation to recommend a unified sentence of ten years, with three years fixed?

ARGUMENT

I.

The District Court Erred In Denying Mr. Smith's Motion To Suppress

Mr. Smith argued in his Appellant's Brief that the district court erred in denying his motion to suppress because his so-called confession was not voluntary due to Officer Kelley's coercive and deceptive interview tactics. (Appellant's Br., pp.5-11.) Mr. Smith properly set forth the standard of review, and made the same argument he made in the district court, relying principally on the same case, *State v. Valero*, 153 Idaho 910 (Ct. App. 2012). (Appellant's Br., pp.5, 11; R., pp.349-52.) In its brief, the State argues Mr. Smith "has not challenged the district court's ruling on appeal, but instead asserted contrary to precedent that the state bears some sort of burden on appeal" (Respondent's Br., p.5.) The State's argument is lacking in merit.

As Mr. Smith stated in his Appellant's Brief, when reviewing a motion to suppress, "This Court will accept the trial court's findings of fact unless they are clearly erroneous. However, this Court may freely review the trial court's application of constitutional principles in light of the facts found." (Appellant's Br., p.5 (quoting *State v. Purdum*, 147 Idaho 206, 207 (2009).) The statements made by Officer Kelley that led to Mr. Smith's so-called confession are undisputed, as the entire interrogation was recorded. This Court is thus called on to make a legal determination as to whether or not Mr. Smith's confession was voluntary. *See, e.g., Valero*, 153 Idaho at 911 (noting the factors surrounding the defendant's incriminating statements were undisputed because the polygraph examination was recorded, and proceeding to review the legal question of whether the defendant's statements were voluntary).

Because this is a legal question, Mr. Smith argues the legal issue. When a defendant alleges an interrogation to be coercive, the State *does* have the burden of showing by a

preponderance of the evidence that the confession is voluntary. *See State v. Brown*, 160 Idaho 635, 637 (Ct. App. 2016). As argued in his Appellant’s Brief, the State did not meet its burden here because Officer Kelley did not provide Mr. Smith with adequate warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), did not allow Mr. Smith to call his wife when he asked to do so, and repeatedly overstated the reliability of the CVSA test and the importance of Mr. Smith accepting responsibility for his conduct, which the officer said was “undeniable” based on the results of the CVSA test. (*See Appellant’s Br.*, pp.6-11.)

Like in *Valero*, the interrogating officer repeatedly told Mr. Smith that the CVSA test was evidence of his guilt. *Compare Valero*, 153 Idaho at 914 (detective conveyed to defendant that “the polygraph was determinative of his guilt” despite defendant’s attempt to deny the accusations against him) *with* Ex. 2, 4:47-55, 22:40-44, 32:39-56 (officer told Mr. Smith the CVSA test “is extremely accurate” and “is proof positive to me” and “absolutely shows me this happened” despite Mr. Smith’s repeated denials). And like in *Valero*, the interrogating officer misstated the law to Mr. Smith, telling him that taking responsibility “never hurts somebody” and if Mr. Smith did not accept responsibility, “then they don’t have any other recourse then to maybe impose the maximum.” (Ex. 2, 32:00-10, 32:39-56.) Officer Kelley refused to accept Mr. Smith’s denials and ultimately fed him the “facts” he needed him to confess. Mr. Smith’s confession was coerced and the district court erred in denying his motion to suppress.

II.

The District Court Erred In Concluding Mr. Smith Breached The Plea Agreement, Thereby Relieving The State Of Its Obligation To Recommend A Unified Sentence Of Ten Years, With Three Years Fixed

The district court erred in concluding Mr. Smith breached the plea agreement when he refused to answer the polygraph examiner's questions regarding the supposedly deceptive responses he provided during the polygraph examination. Mr. Smith's supposed deception relieved the State of its obligation to recommend a rider, but it did not negate the plea agreement as a whole. On appeal, Mr. Smith contends the district court erred in its ruling, and also contends the State breached the plea agreement when it recommended a unified sentence of ten years, with three years fixed. (R., p.373.) The Idaho Supreme Court has held that a claim that the State breached a plea agreement asserts fundamental error that can be raised for the first time on appeal because it "goes to the foundation of a defendant's rights." *State v. Jafek*, 141 Idaho 71, 74 (2005). The State breached its promise to recommend a unified sentence of ten years, with three years fixed, *see* R., p.373, and Mr. Smith is constitutionally entitled to relief. *See Jafek*, 141 Idaho at 74 ("A defendant is constitutionally entitled to relief when the State breaches a promise made to him in return for a guilty plea.") (citation omitted).

CONCLUSION

For the reasons stated above, as well as those set forth in his Appellant's Brief, Mr. Smith respectfully requests that this Court vacate his conviction, reverse the district court's order denying his motion to suppress, and remand this case to the district court for further proceedings. Alternatively, Mr. Smith requests that this Court vacate his conviction, reverse the district court's order re: plea agreement breach and sentencing, and remand this case to the district court with instructions that Mr. Smith be resentenced before a different judge, or be allowed to withdraw his guilty plea.

DATED this 14th day of July, 2017.

/s/

ANDREA W. REYNOLDS

Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July, 2017, I served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT, as follows:

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